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FEDERAL COMMUNICATIONS COMMISSION
BEFORE THE OFFICE OF SECRETARY
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of) PP Docket No. 93-253
)
Implementation of Section 309(j))
of the Communications Act --)
Competitive Bidding) DOCKET FILE COPY ORIGINAL

OPPOSITION TO EMERGENCY PETITION FOR WAIVER

Southeast Telephone, L.P., ("Southeast Telephone") by its attorneys, hereby opposes the "Emergency Petition For Waiver" [hereinafter "Petition"] filed by Telephone Electronics Corporation ("TEC") on March 28, 1995. As shown below, TEC has failed to demonstrate that the waiver is in the public interest, and its Petition should be denied.

Southeast Telephone is a small business that will be eligible to bid in the Commission's broadband Personal Communications Services ("PCS") auctions for the channel C and F licenses. Accordingly, Southeast Telephone has an interest in seeing that other bidders for these licenses meet the Commission's eligibility rules.

TEC's Petition requests a waiver of Section 24.709(a)(1) of the Commission's rules.¹ In footnote 3 of its Petition, TEC

¹ Section 24.709(a)(1) provides:

No application is acceptable for filing and no license shall be granted for frequency Block C or frequency Block F, unless the applicant, together with its affiliates and persons holding interests in the applicant and their affiliates, have gross revenues of less than \$500 million at the time the applicant's short-form (Form 175) application is filed.

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attempted to characterize its Petition as a "request for relief that has not previously been before the Commission..." because TEC "is now willing to narrow the scope of its request to BTAs with populations less than 300,000...."² TEC's "narrow" request is subsumed by the relief it is seeking before the Court of Appeals which now has jurisdiction in this case. TEC's Petition thus is a *de facto* request for reconsideration by the Commission which presently lacks jurisdiction. To Southeast Telephone's knowledge, no party has requested the Court to remand the case to the Commission. Accordingly, the Commission lacks jurisdiction to act on TEC's Petition because the agency and the Court cannot exercise jurisdiction over the same matter simultaneously. See, e.g., United States Transportation Union v. ICC, 871 F.2d 1114 (D.C. Cir 1989).

TEC's Petition is also defective because it fails to completely identify the companies for which the waiver is requested. TEC only describes its "core business" as consisting of "six small rural telephone companies," but identifies only two of those companies by name. TEC also describes itself as the owner of "several small, privately-owned entrepreneurial businesses." Petition, p. 3. It does not indicate whether the waiver is for

² TEC's definition of "rural BTAs" as BTAs with populations less than 300,000 has little meaning given that these BTAs include substantial population centers. appears completely arbitrary with no basis in the rules. Petition, p. 4. In fact, three of the BTAs listed by TEC each contain a city with a population of more than 40,000 (Hattiesburg, MS; Meridian, MS; Jackson, TN), and another contains a city with a population of more than 75,000 (Clarksville, TN). These are not rural areas.

rural telephone companies, or these other businesses, or both, or whether the waiver is to allow each company to bid on each of the "rural" BTAs listed in the Petition.

TEC, as a party seeking waiver of a Commission regulation, must show that application of the rule to its particular facts would not be in the public interest and granting the waiver would not undermine the policy served by the rule. WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969). TEC has failed to meet this burden. The Commission, in the broadband PCS rulemaking proceeding, already concluded that the public interest required rejecting TEC's request for an exception to the affiliation rules. Specifically in response to TEC's request, the Commission stated:

We are concerned that relaxing our rules would unfairly match large rural telephone companies, with greater access to capital, against entrepreneurs and designated entities (including small and medium-size rural telephone companies). We note in this regard, that rural telephone companies already enjoy substantial regulatory benefits (e.g., access to Rural Electrification Administration loans...) affecting available capital in comparison to other designated entities. Moreover, we observe that rural telephone companies will be permitted to acquire partitioned licenses at any time after the close of auctions. We believe that existing measures will thereby achieve our goal of facilitating the rapid deployment of PCS to rural areas.

See Fifth Memorandum Opinion And Order ("Fifth MO&O"), PP Docket No. 93-285, released November 23, 1994, at ¶45. TEC has given no reasons why the Commission should now do a 180 degree turnabout and reverse these public interest findings. TEC has not shown, for instance, that it has the same level access to capital as smaller

entrepreneurs and designated entities, or that it does not benefit from Rural Electrification Administration loans, or why the partitioning process is unsatisfactory. Further, by failing to make such showings, TEC has failed to show that applying Section 24.709(a)(1) would not serve the underlying purpose of that rule.³

TEC has given no valid reason why the waiver is in the public interest. It argues that "barriers" prevent "cross-pooling" between its rural telephone companies and its "non-regulated affiliates." Petition, p. 5. TEC, however, fails to describe these barriers or demonstrate how they prevent cross-pooling. Moreover, contrary to TEC's assertions, a form of cross-pooling already takes place, assuming that its long-distance resellers pay access fees to its rural telephone companies in which case these affiliated companies, in effect, share revenues.

TEC's related argument that its reseller affiliates' "high gross revenue/low profit margin" is grounds for waiving the attribution rule is likewise shallow, based on the same assumption that its resellers are paying access charges to its rural telephone companies. Petition, p. 6. Given this form of revenue sharing between TEC affiliates, TEC's claim that there is no "cross-pooling" is unfounded and provides no support for a waiver.

Moreover, the affiliation rule is stated in terms of "gross

³ TEC seems to forget that the attribution rule is applicable only to block C and F licenses. It remains fully eligible to bid on block D and E licenses. The affiliation rule thus does not work the hardship of foreclosing TEC's participation in the auctions, a further reason why that rule should not be undercut. WAIT Radio, 418 F.2d at 1157.

revenues" not "net revenues," thus preventing a company from hiding its actual resources through overstated expenses. To waive the rule on the basis of the "low profit margin" of TEC's long distance resellers would run contrary to the very purpose of using "gross revenues" in that rule. TEC has presented no unique circumstances or reasons why the Commission should grant a waiver on that basis.

TEC also asserts that application of the Commission's affiliation rule would be contrary to Congress' goal to ensure that PCS service is available in rural areas without delay. However, TEC has not even attempted to show why the Commission's partitioning rules will not fulfill that goal. Nor has TEC shown, other than by mere assertions, that it will bring PCS service to rural areas any faster than other providers if its waiver is granted, or that it will be unable to provide PCS service if the waiver is denied. TEC fails to show why bringing PCS to rural areas without delay should be given any more weight than the other policy goals behind the affiliation rule, namely, to give smaller businesses a chance to compete and to promote competition for delivery of services. In sum, TEC has failed to show why application of the rule to it would not serve any of these policy goals.

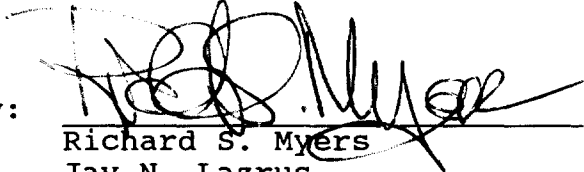
TEC also claims that, without a waiver that includes a 10% bidding credit, it will be at a "severe competitive disadvantage" in an auction with other applicants that did receive bidding credits. Petition, p. 7. Such a claim is totally meaningless because it presents no unique circumstances that justify a rule

as leverage in a waiver proceeding dealing with the same matter.

If the Commission grants a waiver to TEC, other companies will surely follow, placing the Commission on the slippery slope to a de facto rulemaking.⁵ Ad hoc departures by an agency from its own rules and regulations are not sanctioned by the Courts, even if such departures are to achieve laudable aims. Reuters Ltd. v. FCC, 781 F.2d 946, 950-951 (D.C. Cir. 1986). The Commission should not engage in such a departure now, even as a means of lifting the stay on the auctions. It should deny TEC's Petition.

Respectfully submitted,
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⁵Consolidated Communications, Inc. ("CCI") has already sought leave to intervene in TEC's court action. If the Commission goes along with TEC's "settlement/waiver" process, CCI can be the next entity expected to file a more "narrow" waiver request and use the court action as leverage.

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CERTIFICATE OF SERVICE

I, Nichelle Rudd, an employee in the Myers Keller Communications Law Group, do hereby certify that on this 3rd day of April, 1995, I mailed a copy of the foregoing "Opposition To Emergency Petition For Waiver" by first class mail, postage prepaid, to the names and addresses shown on the attached list.



Nichelle Rudd